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No. 06-7949

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, when determining the "reasonableness" of a district court sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a sentence outside the range recommended by the United States Sentencing Guidelines with a finding of extraordinary circumstances.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in the Joint Appendix at J.A. 129-39. It is also available at 446 F.3d 884. The opinion of the United States District Court for the Southern District of Iowa is reprinted in the Joint Appendix at J.A. 118-27 and is also available at 374 F. Supp. 2d 758.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on May 12, 2006, see J.A. 140, and denied a petition for rehearing *en banc* on July 7, 2006, see J.A. 141. The petition for a writ of certiorari was filed on November 22, 2006, and granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a) & (c), 3742(e) & (f), 3582(a), are included as an appendix to this brief.

STATEMENT OF THE CASE

This case presents the issue that the Court could not address this past Term because of the unfortunate death of Mario Claiborne (No. 06-5618): whether the extraordinary circumstances test is inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). The test requires that a sentence which deviates from the range recommended by the United States Sentencing Guidelines be supported by

"extraordinary circumstances." 446 F.3d at 889 (J.A. 137). In essence, it presumes such a sentence to be unreasonable in the absence of a sliding scale of affirmative proof to the contrary, which depends upon how much the sentence "deviates" from the Guidelines range. As this Court strongly suggested in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), this presumption of unreasonableness is wholly inconsistent with the "across the board" reasonableness standard set forth in *Booker* and, therefore, is both unlawful and unconstitutional. *Id.* at 2467.

Mr. Gall's Sentence

While a student at the University of Iowa in early 2000, at the age of 21 and struggling with drugs and alcohol, Brian Michael Gall met a man named Luke Rinderknecht. Mr. Rinderknecht dealt in a drug known scientifically as methylenedioxymethamphetamine ("MDMA"), popularly referred to in its tablet form as "ecstasy." Sent'g Tr. 6-7, 53 (J.A. 66); PSR 7, 14 (Sealed J.A. 151). Ecstasy produces an immediate psychedelic and energizing effect, and is a popular drug among young people. See, *e.g.*, Lloyd D. Johnston et al., *Monitoring the Future: National Results on Adolescent Drug Use 2006*, at 35-36 (2007). Mr. Gall began purchasing tablets of ecstasy from Mr. Rinderknecht and his associates, both for his own use and for resale to other college students. By September 2000, he had distributed several thousand tablets on behalf of Mr. Rinderknecht and had made $30,000 to $40,000 in profits. Sent'g Tr. 6-7 (J.A. 66); PSR 4, 7-8 (Sealed J.A. 152).

Mr. Gall then decided to change his life. Intending to focus on his classes, he stopped using drugs and alcohol in September 2000. He scheduled a meeting with Mr. Rinderknecht and declared that "he was getting out of the drug business and wanted nothing more to do with the conspiracy." 374 F. Supp. 2d at 761 (J.A. 122); see Sent'g Tr. 32-33, 44 (J.A. 86); PSR 3-5 (Sealed J.A. 148). Mr. Rinderknecht thereafter sold no ecstasy to Mr. Gall, and Mr.

Gall neither used nor sold ecstasy or any other drug. 374 F. Supp. 2d at 761-63 (J.A. 123-24); Sent'g Tr. 22-23, 32-33, 44 (J.A. 78, 94-95); PSR 5-7, 14 (Sealed J.A. 148-52). Mr. Gall continued with his studies and graduated in 2002. He then moved to Arizona and accepted a job in the construction industry. PSR 5-7, 15 (Sealed J.A. 148-52, 160-61).

A year later, while still in Arizona, Mr. Gall was approached by federal law enforcement agents. They asked whether he had been involved in a conspiracy to distribute ecstasy. Sent'g Tr. 19-20 (J.A. 75). Mr. Gall frankly admitted to his involvement with Mr. Rinderknecht. 374 F. Supp. 2d at 760 n.1 (J.A. 120); Sent'g Tr. 19-22, 30 (J.A. 75). The agents took no other action at that time.

More than a year later, and four years after his involvement with Mr. Rinderknecht, the Government charged Mr. Gall with conspiracy to distribute ecstasy. Indictment (J.A. 8). Upon learning of the indictment, Mr. Gall voluntarily returned to Iowa and surrendered to federal authorities. Sent'g Tr. 19-24, 30 (J.A. 75-79). During a subsequent debriefing, he again acknowledged his involvement in the conspiracy and provided information concerning its conduct. He was then released on his own recognizance. *Id.* (J.A. 75-79). He resettled in Iowa and has since opened his own construction business, which has been quite successful and employed several individuals. 374 F. Supp. 2d at 762-63 (J.A. 123-24); Sent'g Tr. 19-21 (J.A. 75-77); PSR 13 (Sealed J.A. 157).

On March 2, 2005, shortly after this Court decided *Booker*, Mr. Gall pleaded guilty to conspiracy to distribute a controlled substance. See 21 U.S.C. §§ 841(b)(1)(C), 846. An accompanying plea agreement recites that the maximum sentence for the offense is twenty years' imprisonment, that there is no applicable mandatory minimum, and that the final sentence to be imposed is solely within the discretion of the District Court. Plea Agr. 2-3 (J.A. 13). It also stipulates that, because Mr. Gall withdrew from the conspiracy in September

2000, the 1999 version of the Guidelines should apply and that, in calculating the recommended Guidelines range, Mr. Gall should be held accountable for 10,000 tablets of ecstasy – the total number of tablets distributed by both Mr. Gall and his co-conspirators during Mr. Gall's participation in the conspiracy (even though Mr. Gall himself had distributed less than that amount). *Id.* at 2 n.1 (J.A. 13); PSR 4 (Sealed J.A. 146).

A presentence investigation report was prepared in advance of sentencing. PSR (Sealed J.A. 142-65). It advised that, under the Guidelines, Mr. Gall should be assigned one criminal history point[1] and that his final offense level, based on distribution of 10,000 ecstasy tablets (and after adjustments under the "safety valve" and acceptance-of-responsibility provisions), was 19. The recommended range of imprisonment was 30 to 37 months. PSR 9-12, 18-20 (Sealed J.A. 153-56, 162-65). Neither party objected to the report's Guidelines application. Sent'g Tr. 3-5 (J.A. 62-64).

Mr. Gall argued that the statutory factors of 18 U.S.C. § 3553(a) as well as the departure provisions of the Guidelines justified giving him a sentence below the "advisory" Guidelines range. Def.'s Sent'g Mem. (J.A. 26). He relied on several mitigating facts: his unilateral and unprompted post-offense rehabilitation, his age at the time of the offense, the aberrant nature of his conduct, his cooperation with authorities, his remorse, his acceptance of responsibility, and the benefits that his current business was conferring upon the community. *Id.* at 8-13 (J.A. 31-35).

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[1] The single criminal history point was assigned to Mr. Gall as a result of a conviction in December 1997 of improper storage of a firearm, arising from his failure to close a bag used to store a rifle during a hunting trip. PSR 10-12 (Sealed J.A. 155-56). No criminal points were assigned for Mr. Gall's other two offenses: a conviction in March 1997 of underage possession of alcohol, for which he paid a fine, and a conviction in March 2000 of possession of less than an ounce of marijuana, for which he received a one-year deferred judgment. *Id.* (Sealed J.A. 155-56).

The District Court denied the motion for downward departure. 374 F. Supp. 2d at 760-61 (J.A. 120). As the District Court suggested, the Guidelines explicitly discourage or even prohibit consideration of most of the facts identified by Mr. Gall. See Guidelines §§ 5H1.1, 5H1.4, 5H1.11, 5K2.0(d)(2), 5K2.16. However, the District Court stated that these facts "are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a)." 374 F. Supp. 2d at 760-61 (J.A. 120).

Weighing the factors of § 3553(a), the District Court concluded that a sentence of probation for three years was "sufficient, but not greater than necessary," to satisfy the relevant purposes of punishment. *Id.* at 761-64 (J.A. 122-26). In a detailed and carefully reasoned opinion, the District Court found that Mr. Gall had entered into the conspiracy as a result of immaturity and drug addiction, had later voluntarily withdrawn from the conspiracy and stopped using drugs, had been completely forthcoming about his involvement in the crime when approached by law enforcement agents, and had since become a law-abiding and productive member of society – a finding supported by the "small flood" of letters from Mr. Gall's family, friends and work colleagues. *Id.* at 761-63 (J.A. 122-24). The experienced federal district judge saw no need to sentence Mr. Gall to a term of imprisonment in light of his successful and self-initiated rehabilitation and the low likelihood of recidivism; in fact, the District Court stated that doing so would negatively impact Mr. Gall's progress and would promote "not respect, but derision, of the law." *Id.* at 763 (J.A. 126).

At the same time, the District Court stressed that a sentence of probation is "not an act of leniency" but a "substantial restriction of freedom." *Id.* (J.A. 126). The terms of Mr. Gall's sentence require him to report regularly to a probation officer, to submit to searches of his home and person, to submit to substance abuse testing, and to participate in drug and mental health treatment as directed by the probation

officer. Judgment 2-3 (J.A. 106-107). He is prohibited from leaving the jurisdiction or transferring employment without approval from the probation officer. Mr. Gall's sentence also bars him from patronizing any establishment engaged primarily in the sale of alcoholic beverages. *Id.* (J.A. 109). These restrictions, the District Court determined, represent "just punishment" for the offense and properly balance the purposes of sentencing. 374 F. Supp. 2d at 761-64 (J.A. 122-26).

Appellate Review

The Government appealed Mr. Gall's sentence, and the Eighth Circuit reversed. 446 F.3d at 885 (J.A. 129). Characterizing the sentence as a "100% downward variance" from the Guidelines range, the Eighth Circuit stated that "[a]n extraordinary reduction must be supported by extraordinary circumstances." *Id.* at 889 (J.A. 137) (quoting *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005)). The court of appeals criticized the sentencing judge for giving "too much weight" to Mr. Gall's withdrawal from the conspiracy, his age at the time of the offense, and his post-offense rehabilitation and for not "properly weigh[ing]" the seriousness of the offense and the need to avoid unwarranted sentencing disparities. *Id.* at 889-90 (J.A. 138).

The Eighth Circuit offered a number of specific points in support of its decision. It reasoned that the chosen sentence was unwarranted because Mr. Gall had already received a "significant benefit" from being sentenced under the 1999 version of the Guidelines rather than later versions which recommended higher sentences for ecstasy distribution, see *id.* (J.A. 138) – despite the fact that *ex post facto* principles prohibited application of the later versions, see Guidelines § 1B1.11. Similarly, the court of appeals asserted that Mr. Gall had benefited from the District Court's decision not to hold him "accountable for quantities of ecstasy distributed by other members of the conspiracy *subsequent* to his withdrawal," see 446 F.3d at 890 (emphasis added) (J.A. 138)

– although Mr. Gall could not legally have been held accountable for these quantities, see Guidelines § 1B1.3 cmt. n.2, illus. c (noting that an individual involved in a drug conspiracy is accountable only for the drugs distributed during the period in which he or she has agreed to participate in the conspiracy). The Eighth Circuit also criticized the District Court's observation that Mr. Gall's immaturity may have played a role in the offense, see 446 F.3d at 890 (J.A. 138) – particularly its reliance upon studies such as those suggesting that "human brain development may not become complete until the age of twenty-five," see 374 F. Supp. 2d at 762 n.2 (J.A. 123) – without ever explaining why scientific literature could not be used to bolster the conclusion that Mr. Gall's participation in the conspiracy was aberrant and that he is unlikely to return to such behavior. Finally, the court of appeals stated bluntly that the District Court "ignored the serious health risks ecstasy poses," see 446 F.3d at 890 (J.A. 138) – even though the District Court plainly acknowledged during the sentencing hearing that distribution of ecstasy was a serious offense, see Sent'g Tr. 47, 50 (J.A. 97, 99). Based on these purported errors in the District Court's judgment, the Eighth Circuit deemed the sentence unreasonable. 446 F.3d at 890 (J.A. 139).

SUMMARY OF ARGUMENT

The Government has conceded, as it must, that a presumption of unreasonableness for non-Guidelines sentences is unlawful and unconstitutional. See Brief for United States at 34-35, *Rita*, 127 S. Ct. 2456 (No. 06-5754). And yet the extraordinary circumstances test, as applied by the Eighth Circuit in reversing the judgment of sentence in this case, establishes just such a presumption for sentences outside the Guidelines. Under the test, the courts of appeals will not, in any case, find a non-Guidelines sentence reasonable absent affirmative proof in support thereof and will further require that, the more extensive the deviation from the recommended range, the greater the affirmative

proof – or the more "extraordinary" the circumstances – must be. This standard is plainly contrary to the Constitution and the Sentencing Reform Act, as interpreted by this Court in *Booker* and *Rita*.

Implementation of an "extraordinary circumstances" or "proportionality" test will necessarily lead to the same constitutional defects inherent in the mandatory Guidelines system, which this Court rejected in *Booker*. The Sixth Amendment is implicated when "the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." *Rita*, 127 S. Ct. at 2466 (emphasis in original). The extraordinary circumstances test does nothing less. It provides that a district court cannot impose a sentence outside the range recommended by the Guidelines unless the judge finds "extraordinary" facts in addition to those reflected in the verdict or plea. For this reason alone, the extraordinary circumstances test must be rejected.

In addition to its constitutional flaws, the extraordinary circumstances test also poses a host of statutory problems. The Sentencing Reform Act vests discretion in the sentencing judge to weigh the factors and purposes relevant to sentencing and to decide upon the sentence that is "sufficient but not greater than necessary" to achieve those ends. § 3553(a). The extraordinary circumstances test infringes upon this discretion. It compels the district court to impose sentence within the range recommended by the Guidelines, notwithstanding the court's assessment of the relevant factors and determination of the appropriate sentence.

Moreover, the test violates this Court's admonitions in *Rita* and *Booker* that reasonableness review should be highly deferential. Under this standard, courts of appeals should overturn a judgment as "unreasonable" only if the district court abused its discretion by failing to comply with the statute or by imposing a sentence that no rational judge in the same position could have potentially imposed. Courts

operating under the extraordinary circumstances test, however, are exercising *de novo* review over the sentence and the district court's assessment of the facts relevant thereto. This method of review is indistinguishable from the standard set forth in the statutory provision specifically excised in *Booker*. In its application, the test effectively reconstructs the same mandatory Guidelines system that *Booker* intended to dismantle.

Application of the extraordinary circumstances test infected the Eighth Circuit's opinion in this case. While purporting to recognize that the judgment of sentence should be reviewed only for abuse of discretion, the Eighth Circuit in actuality showed no deference to the District Court's findings. Relying on the extraordinary circumstances test, the court engaged in *de novo* review to determine whether, in its view, the facts of the case were sufficiently "extraordinary" to justify a sentence of probation. The sentence was reversed by the Eighth Circuit not because it represented an abuse of discretion, but because it was not the same sentence that the court of appeals would have imposed according to its independent re-weighing of the § 3553(a) factors.

The judgment of the District Court was well-supported by the record. Mr. Gall voluntarily withdrew from the conspiracy, graduated from college, and thereafter became a productive member of society. There is no reason to believe that a sentence of imprisonment was necessary to protect society or provide "just punishment"; to the contrary, there is every reason to believe, as the District Court stated, that a sentence of imprisonment would serve none of the articulated purposes of punishment, would irrevocably harm Mr. Gall, and would promote "not respect, but derision, of the law." 374 F. Supp. 2d at 763 (J.A. 126). The findings of the District Court fully justify the sentence of probation and, in fact, constitute "extraordinary circumstances" in support of the variance, even if that flawed test should have been applied. The decision of the Eighth Circuit should be

reversed with instructions to affirm the judgment of the District Court.

ARGUMENT

I. THE EXTRAORDINARY CIRCUMSTANCES TEST ESTABLISHES A PRESUMPTION OF UNREASONABLENESS THAT IS CONTRARY TO THE HOLDINGS IN *BOOKER* AND *RITA*.

The extraordinary circumstances test establishes a presumption of unreasonableness for sentences outside the range recommended by the Guidelines. Under that test, all sentences outside the recommended range are invalid unless the sentencing court finds supplemental facts that may be deemed sufficiently "extraordinary" to demonstrate that the calculated Guidelines sentence is inappropriate.[2] See, *e.g.*,

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[2] Eight courts of appeals have expressly adopted the "extraordinary circumstances test," or some variant thereof. *See United States* v. *Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006); *United States* v. *Armendariz*, 451 F.3d 352, 358 (5th Cir. 2006); *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006); *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States* v. *Kendall*, 446 F.3d 782, 785 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2973 (2007); *United States* v. *Bishop*, 469 F.3d 896, 907 (10th Cir. 2006); *United States* v. *McVay*, 447 F.3d 1348, 1357 (11th Cir. 2006). The circuits applying the test have offered varying formulations of this amorphous test and, indeed, have struggled not only to define the level of justification necessary to support a non-Guidelines sentence but even to develop a nomenclature by which to describe their conclusions. *See, e.g., United States* v. *Hildreth*, 485 F.3d 1120, 1127-28 (10th Cir. 2007) (distinguishing among an "extreme," "substantial," and "significant" variances, which must respectively be supported by "extraordinary," "dramatic," and "sufficient" justifications); *United States* v. *Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) (stating that a "World Series" variance requires a "World Series" justification); *cf.* Transcript of Oral Argument at 43, *United States* v. *Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) (noting that the "extraordinary circumstance" test "sounds like a slogan") (Breyer, J.). But, no matter the name applied, the test retains the same basic framework in each circuit in which it is applied: it

United States v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006). On review, the court of appeals will assume that sentences outside the Guidelines are unreasonable in the absence of such affirmative evidence to the contrary. See *id.*; *United States* v. *Myers*, 439 F.3d 415, 417-18 (8th Cir. 2006); *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006). This is the very definition of a "presumption." See, *e.g.*, *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 49-50 n.3 (2003), *cited in Rita*, 127 S. Ct. at 2463 ("[A] trial-related evidentiary presumption . . . insist[s] that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case."). While the Government and the courts of appeals have attempted to characterize the test otherwise – precisely because they understand the problems inherent in such a presumption[3] – they cannot disguise the test's fundamental operation in requiring a greater quantum and quality of evidence to support a sentence outside the Guidelines range than that necessary for one within it.

A presumption of unreasonableness conflicts fatally with this Court's interpretation of the Sixth Amendment and the

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requires *any* non-Guidelines sentence to be supported by supplemental findings of the sentencing court. *See, e.g.*, *Davis*, 458 F.3d at 496 ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) must be.") (quoting *Dean*, 414 F.3d at 729); *see also United States* v. *Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) (stating that circuits applying the test hold that "district courts [must] offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range").

[3] *E.g.*, *Moreland*, 437 F.3d at 433-34 (stating that the extraordinary circumstances test is not a presumption of unreasonableness); *United States* v. *Ferguson*, 456 F.3d 660, 664-65 (6th Cir. 2006) (same); *United States* v. *Howard*, 454 F.3d 700, 703 (7th Cir. 2006) (same); *Myers*, 439 F.3d at 417 (same); *United States* v. *Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 2935 (2007); see *Rita*, 127 S. Ct. at 2467.

Sentencing Reform Act. It forbids district courts from sentencing outside the Guidelines absent additional findings of fact, in violation of the Sixth Amendment; it impinges on the discretion granted to district courts under the Act; and it reconstructs the *de novo* standard of appellate review that this Court excised in *Booker*. The presumption of unreasonableness, and the extraordinary circumstances test from which it arises, must be rejected.

A. The Extraordinary Circumstances Test Violates The Constitutional Right To A Jury Trial Under The Sixth Amendment.

The Sixth Amendment guarantees that a defendant will suffer no greater punishment upon conviction than that which is authorized under governing law based solely on the facts found by a jury or admitted in a plea. *Cunningham* v. *California*, 127 S. Ct. 856, 860 (2007). A court is therefore constitutionally prohibited from imposing a sentence above that authorized exclusively by the verdict or plea. *Id.*; *Blakely* v. *Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The Court has applied this standard to invalidate sentencing schemes that forbid the trial judge from imposing sentence outside a particular range in the absence of additional findings beyond those reflected in the verdict. In *Blakely*, state law established a sentencing range based upon facts reflected in the guilty verdict or plea and then allowed the judge to sentence above that range only if he or she made prescribed findings of fact or found other "substantial and compelling reasons" for doing so. 542 U.S. at 299-300. In *Booker*, the mandatory Guidelines prohibited the judge from imposing sentence above the "base" range, as determined by the facts found by the jury or admitted by the defendant, absent factual findings warranting an enhancement or departure. 543 U.S. at 226-27, 233-34. And, most recently in *Cunningham*, state law directed the judge to impose a presumptive "middle term" sentence, established by reference to the verdict or plea,

unless the judge found "circumstances in aggravation" or "circumstances in mitigation" warranting a sentence in the "upper term" or the "lower term." 127 S. Ct. at 862-68. All of these systems were deemed unconstitutional because they established a sentencing range based on the facts reflected in the verdict or plea and then forbade the trial judge from imposing a sentence above that range in the absence of additional, judge-made findings of fact. See *Rita*, 127 S. Ct. at 2466 ("The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede).") (emphasis in original).

The extraordinary circumstances test gives rise to a sentencing system materially indistinguishable from those at issue in *Blakely*, *Booker*, and *Cunningham*. Under the test, the only manner in which the sentencing court can impose a sentence above the base Guidelines range (determined by the facts reflected in the verdict or plea) is (i) by making additional findings that enhance the range under the Guidelines or (ii) by making findings that justify a variance under § 3553(a). See, *e.g.*, 446 F.3d at 889 (J.A. 136-37). In either case, the findings increase the maximum punishment to which the defendant is exposed; yet, they are made by the judge, not the jury. This violates the "bright-line rule" of *Apprendi*: "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Indeed, the test imposes a double factfinding requirement in many cases. Initially, sentencing courts must often find facts beyond those reflected in the jury's verdict or the defendant's plea to establish the Guidelines sentence.[4] These findings, if

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[4] Although "over 95% of all federal criminal prosecutions are terminated by a plea bargain[] and . . . in almost half of the cases that go to trial there are no sentencing enhancements," *Booker*, 543 U.S. at 273-74

they increase the permissible sentence above the base range established by the verdict or plea, constitute a violation of the Sixth Amendment. See *Booker*, 543 U.S. at 234-36. Then, if the sentence to be imposed is above the Guidelines range, the test requires the court to find and articulate *additional* facts in support thereof. This second level of factfinding serves to increase the permissible sentence even farther above the base range and likewise constitutes a violation of the Sixth Amendment. See, *e.g.*, *Blakely*, 542 U.S. at 299-300. In this regard, the test exacerbates the extra-verdict factfinding that engenders Sixth Amendment questions in the first instance.

The fact that Mr. Gall's sentence is lower than the recommended Guidelines range does not diminish the import of the constitutional questions engendered by an extraordinary circumstances test. The extraordinary circumstances test is structural and systemic: it affects all sentences outside the Guidelines in the jurisdictions in which it has been adopted. See, *e.g.*, *United States* v. *McMannus*, 436 F.3d 871, 874 (8th Cir. 2006). In this respect (and as explained further *infra*), the test cabins the constitutionally mandated discretion of the sentencing court to treat the Guidelines as wholly advisory. See *Rita*, 127 S. Ct. at 2463-67; *Booker*, 543 U.S. at 246. It requires the sentencing court to give the Guidelines range "special weight" by necessitating significant additional findings, and significant additional work, to justify any "deviation."

It is no answer to suggest that the Court could ameliorate constitutional concerns by holding that the test shall apply only to sentences lower than the base Guidelines range. First, such a holding (even if it could be somehow justified under the language and history of the statute, see *infra*) would raise

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(Stevens, J., dissenting in part), it remains the case that many plea agreements – like the one executed by Mr. Gall, *see* Plea Agr. (J.A. 12) – do not address all (or, sometimes, any) of the outstanding factual disputes material to sentencing, requiring the district judge to resolve those issues during subsequent proceedings. *See* Fed. R. Crim. P. 32(f), (g), (i).

the significant risk of restoring the Guidelines range to a *de facto* mandatory status by emphasizing their "special weight" at the district court level. See *Rita*, 127 S. Ct. at 2465-67 (stating that a rule presumptively requiring the district court to sentence within the Guidelines range would raise constitutional concerns). Second, this Court expressly rejected the imposition of such a "one-way ratchet" as a permissible outcome in *Booker*. 543 U.S. at 266 ("[W]e do not see how it is possible to [treat the Guidelines as advisory in some cases but] leave the[m] as binding in other cases. . . . We do not believe that such 'one-way lever[s]' are compatible with Congress' intent.") (internal citation omitted); see *Rita*, 127 S. Ct. at 2477 n.2 (Scalia, J., concurring in the judgment) ("[S]ince reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high."). Finally, the very fact that the extraordinary circumstances test would violate constitutional protections in a number of cases, even if it does not do so here, justifies consideration of the issue in this case. See *Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) ("If one of [two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court.").

It is also no answer to characterize the extraordinary circumstances test as merely a requirement that district courts fully articulate the reasons for non-Guidelines sentences. See Brief of Respondent at 34, *United States* v. *Claiborne*, 127 S. Ct. 2245 (2007) (No. 06-5618) ("Resp. *Claiborne* Brief"). While courts of appeals may properly demand articulation of the specific reasons for sentences outside the Guidelines (just as they must demand an articulation of reasons even for sentences inside the Guidelines range), see § 3553(c), the extraordinary circumstances test goes farther. It requires that the sentencing court offer not only more explanation, but

additional findings of fact to support a sentence outside the Guidelines and *further* requires that those facts meet the qualitative test of being unusual to the point of being "extraordinary" or "compelling." See, *e.g.*, *United States* v. *Maloney*, 466 F.3d 663, 668 (8th Cir. 2006) (requiring "exceptional facts"); *Davis*, 458 F.3d at 500 (requiring "extraordinary facts"). Thus, the sentencing court cannot satisfy the quantitative or qualitative nature of the test merely by saying or writing more. See *Moreland*, 437 F.3d at 436 (character-izing district court's recitation of reasons as "exemplary" but overturning judgment as unreasonable); see also, *e.g.*, *United States* v. *Mateo*, 471 F.3d 1162, 1170 (10th Cir. 2006) (requiring "dramatic facts"), *cert. denied*, 127 S. Ct. 2890 (2007); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (stating that justification should be "fact-specific").[5] Indeed, the Government itself has characterized the test as requiring the sentencing court to identify "facts" in support of a sentence outside the Guidelines. Resp. *Claiborne* Brief at 36. No reported decision has upheld a non-Guidelines sentence under the extraordinary circumstances test based solely on the facts found by the jury.[6]

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[5] Moreover, courts have frequently held that a district court may not vary from the Guidelines based solely on policy disagreements with the Commission or Congress. *E.g.*, *United States* v. *Gentile*, 473 F.3d 888, 892-93 (8th Cir. 2007); *see also United States* v. *Spears*, 469 F.3d 1166, 1174-75 (8th Cir. 2006) (en banc) (citing cases); *United States* v. *Williams*, 472 F.3d 835, 838-39 (11th Cir. 2006) (Murphy, J., concurring) (same); *Mateo*, 471 F.3d at 1171 (same); *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006) (same). The Court will address the issue of whether a district court may consider policy disagreements regarding the crack-powder ratio in crafting a sentence in *United States* v. *Kimbrough*, No. 06-6330 (U.S. cert. granted June 11, 2007).

[6] Several courts have gone so far as to suggest that a factor will be deemed "extraordinary" – so as to justify a variance from the recommend range – only if it is not adequately taken into consideration in the Guidelines. *See United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007) (criticizing reliance upon medical and mental conditions as grounds for a non-Guidelines sentence as those factors are discouraged under the

Further, most criminal verdicts are general in nature, stating only whether the defendant is guilty or not. Even special verdicts normally include only those factual inquiries necessary to establish the minimum elements of the charged offense and statutory sentencing enhancements. See, *e.g.*, *United States* v. *Hedgepeth*, 434 F.3d 609, 613-14 (3d Cir.), *cert. denied*, 126 S. Ct. 2055 (2006); *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46-47 (1st Cir. 2003). The verdict generally says nothing about the particular offender or the particular offense or whether the defendant's circumstances differ from those of other defendants convicted of similar crimes. And verdicts do not, except in capital cases, require juries to find facts in mitigation. The only means by which a judge can determine that a case is somehow different from the run of the mine – i.e., "extraordinary" – is through additional findings of fact. Most often this is done by adopting the presentence investigation report, the allegations of which may suffer from evidentiary flaws not subject to traditional adversarial challenge. See, *e.g.*, *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part) (criticizing the practice of "*judges* determin[ing] 'real conduct' on the basis of bureaucratically prepared, hearsay-riddled presentence reports" as opposed to "adher[ing] to the old-fashioned process of having *juries* find the facts that expose a defendant to increased prison time") (emphasis in original).

Respondent has suggested that the range of factors upon which a non-Guidelines sentence may be based are broader than those upon which a traditional Guidelines departure could be granted. See Resp. *Claiborne* Brief at 39. This proposition, even if true, is irrelevant. The Sixth Amendment

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Guidelines); *United States* v. *Likens*, 464 F.3d 823, 826 (8th Cir. 2006) (concluding that issues such as age and drug addiction – because they are labeled as discouraged factors under the Guidelines – are "not ordinarily extraordinary circumstances" and cannot support a variance); *United States* v. *Ture*, 450 F.3d 352, 359 (8th Cir. 2006) (because the factors identified by the district court "weighed heavily in [calculating the] Guidelines range," those factors did not support the variance).

problem arises not because limitations are placed on the judge's discretion to choose among the facts sufficient to justify an increased sentence, but because the judge is obliged to make additional findings to authorize the sentence in the first place. See *Blakely*, 542 U.S. at 305 ("Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.") (internal parentheticals omitted), *quoted in Cunningham*, 127 S. Ct. at 865.

Respondent has also attempted to salvage the test by stating that it applies only to "significant" variances. See Resp. *Claiborne* Brief at 38. This is incorrect as a matter of law. The courts of appeals that have adopted the test most often apply it *whenever* the sentence falls outside the Guidelines. See, *e.g.*, *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) [must be]."); see *supra* note 3. More importantly, it is wholly immaterial to the constitutional inquiry. Whether the court of appeals applies the test to all sentences outside the Guidelines or only to those that are somehow determined to be "significantly" outside the recommended, the result is the same: the court of appeals has imposed an additional factfinding requirement and a limitation on the discretion of the district court to impose a sentence above or below a certain range. See *Rita*, 127 S. Ct. at 2466.

The extraordinary circumstances test establishes a presumption of unreasonableness in violation of the Sixth Amendment. See *id.* at 2467; see also *Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part) ("[A]ny system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."). The cure for the constitutional problem

lies in the invalidation of the extraordinary circumstances test in all of its forms. This will render the Guidelines "genuinely" advisory and give district courts the discretion to sentence within the statutory range based on a rational assessment of the relevant factors. *Cunningham*, 127 S. Ct. at 871. Such an approach would "encounter no Sixth Amendment shoal." *Id.*

B. The Extraordinary Circumstances Test Contravenes The Sentencing Reform Act.

The Sentencing Reform Act is unambiguous. It directs the *sentencing judge* to "consider" the factors and purposes relevant to punishment and to "impose" the sentence that is "sufficient but not greater than necessary" to satisfy those purposes. *Rita*, 127 S. Ct. at 2467 (quoting § 3553(a)). The statute contains no hierarchy of factors and does not mandate that a district court give greater or controlling weight to the Guidelines or other considerations. *Booker*, 543 U.S. at 304-05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors."). To the contrary, as this Court recognized in *Rita*, the modified statute contemplates – indeed, requires – that district courts have the discretion to give the relevant factors and purposes the weight they rationally deem appropriate in light of the circumstances of the case. § 3553(a); see *Rita*, 127 S. Ct. at 2465.

To be sure, the discretion granted to sentencing courts is not unbounded. Pursuant to the Court's opinion in *Booker*, sentencing courts will look to Congress's articulation of the sentencing purposes and factors set forth in § 3553(a) and must give reasons for the sentence imposed, as required by § 3553(c), whether that sentence is inside or outside the Guidelines range. *Booker*, 543 U.S. at 259-61; see *Rita*, 127 S. Ct. at 2463-69. The sentencing court must also honor Congress's plain directive to impose the sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing. *Id.* at 2463 (quoting § 3553(a)). But it is the sentencing judge, and the sentencing judge alone,

who holds the authority to weigh the principles and factors relevant to punishment and, based upon a rational assessment of those considerations, to determine the appropriate sentence in each individual case. *Id.*

The extraordinary circumstances test abrogates this statutory discretion. By mandating that a district court impose sentence within the Guidelines range absent "extraordinary circumstances," the test effectively forces the district court to give greater weight to a single factor – the range recommended by the Guidelines – than to all of the other factors and purposes listed in § 3553(a). The sentencing court cannot disagree with the Guidelines or decide that the policies on which they are based do not deserve weight in a particular case. See, *e.g.*, *United States* v. *Gentile*, 473 F.3d 888, 892-93 (8th Cir. 2007); *United States* v. *Williams*, 472 F.3d 835, 838-39 (11th Cir. 2006); *Mateo*, 471 F.3d at 1171; *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Rather, it is compelled under the test to accord the Guidelines controlling authority unless other facts provide affirmative and "extraordinary" justifications for imposing a sentence different than the recommended range. See, *e.g.*, *United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007); see also 446 F.3d at 889 (J.A. 136-37).

The test is also inconsistent with Congress's overarching command that the District Court must impose the sentence that is "sufficient but not greater than necessary." § 3553(a). This command is neither superfluous statutory language nor a simple mandate for leniency. It carries strong historical and moral underpinnings and prohibits punishment that serves no distinct purpose or may otherwise be deemed gratuitous in light of the characteristics of the defendant and the nature of the crime. Brief of Families Against Mandatory Minimums as Amicus Curiae Supporting Petitioner at 5-12, *Rita*, 127 S. Ct. 2456 (No. 06-5754) ("FAMM Brief"). Yet, under the test, the sentencing court is barred from determining that a sentence outside the Guidelines would serve the purposes of

punishment in a particular case, unless the facts of the case can be deemed somehow "extraordinary." See, *e.g.*, *Borho*, 485 F.3d at 912-16; see also 446 F.3d at 889 (J.A. 136-37). This showing will necessarily be difficult to make in the majority of "ordinary" cases – especially in light of restrictive circuit court precedent on the issue. See, *e.g.*, *United States* v. *Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States* v. *Matheny*, 450 F.3d 633, 642 (6th Cir. 2006); *Myers*, 439 F.3d at 417; *Moreland*, 437 F.3d at 433. District courts will therefore regularly be forced to impose a Guidelines sentence despite their determination that a lesser (or greater) one would be "sufficient but not greater than necessary" to meet the purposes of § 3553(a).

This Court recognized in *Booker* and *Rita* that, under the revised version of the Act, the range recommended by the Guidelines is merely "advisory." *Rita*, 127 S. Ct. at 2467; *Booker*, 543 U.S. at 246. While the sentencing court must "consider" and "consult" the Guidelines, *Booker*, 543 U.S. at 246, the judge must then be free to determine, based upon a rational assessment of the § 3553(a) factors, that a different sentence is "sufficient but not greater than necessary" to satisfy the purposes of punishment. *Rita*, 127 S. Ct. at 2462-65.

A sentencing court operating under the burden of the extraordinary circumstances test simply cannot make a reasoned decision based upon its assessment of the statutory factors, principles, and purposes. Instead, a court contemplating a sentence different from the Guidelines range must engage in a further exercise of finding, specifying, and articulating – with increasing levels of emphasis (depending on some undefined measure of distance from the Guidelines calcu-lation) – additional facts to justify its decision. *E.g.*, *United States* v. *Hildreth*, 485 F.3d 1120 (10th Cir. 2007). Heaven help the judge who, despite a careful articulation of reasons, does not discuss every single one of the statutory factors under § 3553(a) *and* make supplemental findings of

fact that can be characterized as "extraordinary." Such incompleteness is grounds for reversal, see 446 F.3d at 889 (J.A. 137), despite the fact there is no such requirement for judges who impose sentence within the Guidelines. Such a double-standard for imposing sentence is expressly rejected by *Rita*, see 127 S. Ct. at 2465 ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."), and is wholly inconsistent with *Booker*, see 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must *consult* those Guidelines and take them into account when sentencing.") (emphasis added).

C. The Extraordinary Circumstances Test Is Inconsistent With The "Reasonableness" Standard Of Appellate Review Adopted In *Booker*.

The extraordinary circumstances test turns a constitutionally balanced sentencing regime on its head. In its current guise, it functions (as before *Booker*) to permit a court of appeals to overturn a judgment of sentence solely because the appellate court would have imposed a different sentence than the district court. Under the test, appellate courts need not give deference to the district court's determination that a non-Guidelines sentence is appropriate. Rather, they may exercise essentially *de novo* review over sentences to determine whether, in their view, the magnitude of the variance is justified by "extraordinary circumstances." See, *e.g.*, *Moreland*, 437 F.3d at 433-34.

In *Booker*, this Court excised from the Sentencing Reform Act the provision that directed courts of appeals to exercise *de novo* review over non-Guidelines sentences to determine whether they "depart to an unreasonable degree from the applicable guidelines range." 543 U.S. at 259-61 (citing 18 U.S.C. § 3742(e)). In place of this provision, the Court held that courts of appeals should review sentences "across the board" to determine whether they are "reasonable" in light of all of the factors and purposes of § 3553(a). *Id.* This form of

review, based on the pre-2003 version of the statute, was intended to be highly deferential. See *id.* This standard, properly construed, contemplates that a judgment will be overturned on appeal as "unreasonable" only if the district court abused its discretion by failing to comply with the statute or by imposing a sentence that no rational judge in the same position could have potentially imposed. See *Rita*, 127 S. Ct. at 2465 (noting "our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion"); *id.* at 2470-71 (Stevens, J., concurring) ("*Booker* replaced the *de novo* standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called 'reasonableness' review.") (internal citation omitted); cf. *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (in reviewing a finding to determine whether it is "reasonable," an appellate court should affirm even when it would have reached a different result so long as a rational jurist could have potentially reached the challenged result).

This standard is consonant with the principle, previously recognized by this Court, that "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations." *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (stating that district courts must have the flexibility to resolve questions "involving multifarious, fleeting, special, narrow facts that utterly resist generalization") (internal quotes omitted). Only district courts have direct exposure to the defendant and the opportunity to assess the evidence and testimony as it is presented, in the context of the entire case. See *United States* v. *Stevenson*, 396 F.3d 538, 543 (4th Cir.) ("[B]ecause trial courts conduct the factfinding process repeatedly and routinely, they develop a facility – indeed an *expertise* – to which appellate courts should find it wise to

defer."), *cert. denied*, 544 U.S. 1067 (2005).[7] There is inherent tension among the statutorily enumerated purposes of punishment, see *Rita*, 127 S. Ct. at 2464 (noting that "the goals of *uniformity* and *proportionality* often conflict") (emphasis in original), and there is no single "right" sentence that a court of appeals should dictate in a given case, see *Koon*, 518 U.S. at 98. Rather, reconciliation of the conflicting statutory purposes and choice of the final sentence are properly left to the sentencing judge, with the court of appeals refereeing the proceedings to ensure that the judgment is not out of rational bounds. *Rita*, 127 S. Ct. at 2464 ("[D]ifferent judges (and others) can differ as to how best to reconcile the disparate ends of punishment.").

The cases cited by the Court in *Booker* as exemplifying reasonableness review bear this out. These decisions do not require exceptional circumstances to justify variances from the Guidelines range. See *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004); *United States* v. *Hurst*, 78 F.3d 482 (10th Cir. 1996); see also *United States* v. *Tsosie*, 376 F.3d 1210, 1218 (10th Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005); *United States* v. *Kelley*, 359 F.3d 1302, 1304-05 (10th Cir. 2004); *United States* v. *Cook*, 291 F.3d 1297, 1302 (11th Cir. 2002); *United States* v. *Wall*, No. 99-1626, 2000 WL 280322, at *3-4 (2d Cir. Mar. 14, 2000); *United States* v. *Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998). Rather, they recognize that the advisory range, while entitled to consideration, should "inform[] rather than cabin[] the exercise of the judge's discretion." *United States* v. *Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004). Just as reasonableness review in the revocation context is not tethered to the advisory range, so must reasonableness review post-*Booker*

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[7] *See also Likens*, 464 F.3d at 827 n.1 (Bright, J., dissenting) ("In his tenure as a federal district judge, Judge Pratt [the sentencing judge here] has sentenced approximately nine hundred ninety offenders ... all of whom he has looked in the eye when imposing a sentence.").

remain unchained to the Guidelines. Brief of Petitioner at 26, *Rita*, 127 S. Ct. 2456 (No. 06-5754).

The standard applied under the extraordinary circumstances test is materially indistinguishable from the standard applied under the provision of § 3742(e) excised in *Booker*. That provision required appellate courts to review *de novo* a non-Guidelines sentence to determine whether it "depart[s] to an unreasonable degree from the applicable guidelines range." § 3742(e). The extraordinary circumstances test is merely a surrogate for this excised standard, giving definition to those sentences that "depart to an unreasonable degree" – that is, those which are not accompanied by additional, peculiar circumstances that rise to the level of extraordinary or compelling. See, *e.g.*, *Moreland*, 437 F.3d at 433. This is an express invitation to courts of appeals to impose their own judgment in the matter, as opposed to deciding (as they should) only whether the district court's sentence was reasonable under the facts at hand. See *Rita*, 127 S. Ct. at 2483 n.7 (Scalia, J., concurring in the judgment) ("Courts have no power to add provisions that might be desirable now that certain provisions have been excised.").

The most vivid illustrations of the type of *de novo* review exercised by courts of appeals under the extraordinary circumstances test are found in numerous opinions where the courts of appeals have instructed district courts that they *must* sentence within a particular range on remand. *United States* v. *Rajwani*, 476 F.3d 243, 253 (5th Cir.) (no more than 92 months' imprisonment), *amended on other grounds*, 479 F.3d 904 (5th Cir. 2007); *United States* v. *Thurston*, 456 F.3d 211, 220 (1st Cir. 2006) (no less than 36 months' imprisonment); *Moreland*, 437 F.3d at 437 (no less than 20 years' imprisonment); see also *United States* v. *Ture*, 450 F.3d 352, 359 (8th Cir. 2006) (requiring district court to impose sentence of imprisonment on remand). That these courts have taken this step – deciding for themselves the permissible range of sentences – exposes the pernicious effect of the

extraordinary circumstances test. In this fashion, the test entirely supplants the deference to the district court's exercise of judgment that the Court found critical in *Booker* and *Rita*. See *Rita*, 127 S. Ct. at 2463-66; *Booker*, 543 U.S. at 260-61. The test endorses the mistaken view that courts of appeals are empowered to engage in *de novo* review of the facts of the case and to decide for themselves what the appropriate sentence should be.

Nor does the extraordinary circumstances test find support in the prior decisions of this Court cited in *Booker*: *Pierce* v. *Underwood*, 487 U.S. 552 (1988), *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), and *Koon*. These cases emphasize that, under abuse-of-discretion review, the district court must be granted deference to assess the evidence and render judgment based on the individual circumstances of the case. *E.g.*, *Koon*, 518 U.S. at 99. Nothing in these decisions suggests that the court of appeals should weigh the pertinent factors itself or may direct the district court to give greater or lesser weight to one of the relevant considerations. As the Court remarked in *Koon*: "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Id.* at 97 (quoting *Williams* v. *United States*, 503 U.S. 193, 205 (1992)).

The extraordinary circumstances test cannot legally coexist with the presumption of reasonableness recently upheld in *Rita*. The presumption of reasonableness, as this Court noted, is a purely appellate standard. *Id.* at 2462-68. It imposes no limitation on the district court and interferes in no way with the sentencing judge's authority under § 3553(a) to impose a sentence within or without the range recommended by the Guidelines. *Id.* It merely acknowledges that, when the sentencing judge has weighed all of the relevant factors and has nevertheless determined in the exercise of his or her discretion that a sentence within the Guidelines range is appropriate, the court of appeals may generally assume that

the sentence represents a "reasonable" exercise of that discretion. *Id.*

In *Rita*, the Court emphasized that one basis for such confidence in the result lies in the confluence of the district court's judgment with that of the Commission. *Id.* The validity of this rationale, however, turns on whether the district court has independently exercised its judgment. See *id.* at 2465 ("In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). The extraordinary circumstances test encroaches on this judgment by mandating that the district court give presumptive weight to one factor: the range recommended by the Guidelines. It does not merely "encourage" district courts to sentence within the Guidelines: it compels them to do so in the absence of special circumstances.

There is no basis to presume a non-Guidelines sentence unreasonable. A judge who imposes a sentence outside the Guidelines thereby indicates that he or she has declined to adopt the findings and recommendations of the Sentencing Commission as inconsistent with the needs of the case at bar. See *id.* at 2464-65. In such a case, unlike when the judge imposes sentence within the Guidelines, there is no alignment of the "judge's discretionary decision [and] the Commission's view of the appropriate application of § 3553(a)" and no reason for an appellate court to assume that the range recommended by the Guidelines represents the "sufficient but not greater than necessary" sentence. *Id.* at 2463-65 (internal citation omitted). To the contrary, to presume the Guidelines range to be "correct" would improperly grant greater deference to the Commission than to the sentencing judge, who is tasked under the Sentencing Reform Act with crafting the final sentence in an individual case. *Id.* In other words, the test improperly "grant[s] greater factfinding leeway to an expert agency than to a district judge." *Id.*

"That the district court retains much of its traditional discretion does not mean appellate review is an empty exercise." *Koon*, 518 U.S. at 98. Courts of appeals are still empowered to correct legal error by the district courts and to ensure that those courts follow the statutory mandate to consider all relevant factors and determine the sentence that is "sufficient but not greater then necessary." See *Rita*, 127 S. Ct. at 2462-65. An appellate panel may assess the reasons given by the district court to assure that they are not irrational or irrelevant – such as, for instance, a policy that Yankees fans should receive lighter sentences than Red Sox fans, see *id.* at 2473 (Stevens, J., concurring); *id.* at 2482-83 & n.6 (Scalia, J., concurring in the judgment) – and may overturn judgments that are so plainly excessive (or unjustifiably lenient) that a rational judge in the same position could not have imposed the same sentence. See *id.* at 2462-65.

Rejection of the extraordinary circumstances test is thus perfectly in accord with this Court's observation that, even after *Booker*, "appellate review[] . . . would tend to iron out sentencing differences." 543 U.S. at 263. There is no need, nor any statutory basis, to engraft onto the system a presumption of unreasonableness in order to compel compliance with the Guidelines or promote uniformity.[8]

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[8] Whether the Guidelines themselves are effective in promoting uniformity is open to debate. Mandatory application of the Guidelines has been shown to exacerbate, not reduce, disparities among sentences in the federal system. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (1997). The Sentencing Commission itself has acknowledged that the relevant conduct rules give rise to "significant sentencing disparit[ies]" and that "questions remain about how consistently [they] can be applied." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 27, 50 (2004).

The legislative history of the Sentencing Reform Act confirms that Congress expected that sentencing judges would exercise discretion in individual cases to choose the appropriate sentence for the defendant, whether or not that sentence falls outside the Guidelines range. See S. Rep. No. 98-225, at 52 (1983) ("[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case."); *id.* at 150 ("The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of the sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."). To the extent that disparities may sometimes result from full and reasoned application of § 3553(a), these disparities are not "unwarranted" at all. Rather, they reflect the proper and intended functioning of the Act, which gives discretion to the sentencing judge to decide upon the appropriate sentence. *Rita*, 127 S. Ct. at 2463. Affirmance of such sentences, even though they lie outside the Guidelines range, is thus fully consistent with congressional intent and the statutory language, which is more than can be said for the extraordinary circumstances test.

II. THE DISTRICT COURT'S CHOICE OF A BELOW-GUIDELINES SENTENCE IN THIS CASE WAS REASONABLE.

Here, the District Court considered the relevant factors under § 3553(a), imposed the sentence that it determined was "sufficient but not greater than necessary" to satisfy the relevant purposes, and offered a thorough explanation for its decision. The Eighth Circuit failed to give deference to the District Court's determination and, instead, reversed the sentence on the ground that the facts identified by the District Court were not "extraordinary." This standard should not have been applied and, in any event, should have led the court of appeals to affirm the sentence.

A. The District Court Considered All Relevant Factors And Imposed The Sentence That Was "Sufficient But Not Greater Than Necessary" To Comply With The Purposes Of Sentencing.

The District Court in this case imposed a sentence rationally grounded in the § 3553(a) factors and consistent with the statute's command to impose the sentence that is "sufficient but not greater than necessary" to meet the purposes of punishment. One need look no further than the careful sentencing memorandum prepared by the District Court as confirmation. In the introductory section of that memorandum, the District Court recognized that, "[i]n fashioning a sentence that is 'sufficient, but not greater than necessary,'" it must consider all factors and purposes of § 3553(a), which it then listed individually. 374 F. Supp. 2d at 759-60 (J.A. 118-19). There is no doubt that the District Court appreciated its duties under the statute.

In compliance with those duties, the District Court started with an assessment of the range and policies recommended under the Guidelines. See § 3553(a)(4), (5). It adopted the findings of the presentence report and concluded that the recommended range of imprisonment was 30 to 37 months. 374 F. Supp. 2d at 760 (J.A. 119-20). It then denied Mr. Gall's motions for a downward departure under the Guidelines – based upon his age, his cooperation, his acceptance of responsibility, his remorse, his post-offense rehabilitation, his voluntary withdrawal, and the "aberrant" nature of the offense – while noting that these factors could be "better discussed" and "more aptly considered" under § 3553(a). *Id.* at 760-61 (J.A. 120-22).

As to the "nature and circumstances of the offense" and Mr. Gall's "history and characteristics," § 3553(a)(1), the District Court found that Mr. Gall's conduct did not involve violence or firearms and "appears to stem from his addictions to drugs and alcohol." 374 F. Supp. 2d at 761-62 (J.A. 122). Mr. Gall was using ecstasy and other drugs regularly when he

met Mr. Rinderknecht, and there is little doubt that his addictions induced him to participate in the distribution conspiracy. See Sent'g Tr. at 53 (J.A. 101-02). The District Court also indicated that Mr. Gall's offense could be attributed in part to his immaturity, noting that "all of [Mr. Gall's] criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger." 374 F. Supp. 2d at 761-62 (J.A. 123). Notably, neither of these factors – substance abuse and youth – are relevant facts under the Guidelines. Guidelines § 5H1.1 ("Age (including youth) is not ordinarily relevant in determining whether a departure is warranted."); *id.* § 5H1.4 ("Drug or alcohol dependence or abuse is not a reason for a downward departure.").

Perhaps most important to the District Court's decision was another fact that the Guidelines substantially discount: Mr. Gall's acceptance of responsibility and post-offense rehabilitation. See 374 F. Supp. 2d at 762-64 (J.A. 122-26); cf. Guidelines § 5K2.0(d)(2) (prohibiting departure based on "defendant's acceptance of responsibility for the offense"). Mr. Gall voluntarily withdrew from the conspiracy in September 2000,[9] and when later approached by law enforcement agents – nearly *three years* after the events at issue – he forthrightly admitted to his involvement in the crime. Cf. *id.* § 5K2.16 (stating that voluntary disclosure is

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[9] Mr. Gall's voluntary withdrawal from the conspiracy may be even more significant in light of the fact that he had obtained $30,000 to $40,000 from the scheme. These profits were, as characterized in the presentence report, "easy money," PSR at 14 (Sealed J.A. 159), and must have been highly tempting for someone in Mr. Gall's position, "from a working-class family [with] few financial resources," 374 F. Supp. 2d at 762 n.3 (J.A. 124). *Cf.* Guidelines § 5H1.12 ("[C]ircumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."). That Mr. Gall, unlike his codefendants, nevertheless abandoned the venture reflects positively on his character, even if (as the District Court suggested, *see* 374 F. Supp. 2d at 762 n.3 (J.A. 123)) the retention of profits from criminal activity generally militates in favor of punishment.

not a ground for departure if it occurs as part of an investigation). Since the time of the offense, he has graduated from college, learned a trade, and built a successful business. Cf. *id.* § 5H1.11 ("[E]mployment-related contributions[] and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."). He has remained sober and law-abiding during this period, becoming a productive member of the community. Cf. *id.* § 5H1.6 ("[C]ommunity ties are not ordinarily relevant in determining whether a sentence should be below the applicable guideline range."). The District Court correctly characterized his post-offense behavior as "exemplary," prompting a "small flood of letters from family, friends, and work colleagues attesting to [Mr. Gall's] character." 374 F. Supp. 2d at 762-64 (J.A. 124-26).

The District Court also addressed the "kinds of sentences available" and the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." See § 3553(a)(3), (6). It noted that the United States Code authorized a sentence of either probation or imprisonment for the offense of which Mr. Gall was convicted. 374 F. Supp. 2d at 762-64 (J.A. 124-25); see PSR 18-19 (Sealed J.A. 162-64). It also reiterated that the Guidelines generally call for a term of imprisonment of 30 to 37 months for similar offenses committed by defendants in the same criminal history category. 374 F. Supp. 2d at 762-64 (J.A. 124-26). Nevertheless, the District Court found that several considerations, primarily Mr. Gall's post-offense rehabilitation, set Mr. Gall apart from other defendants and warranted a disparate sentence in this case.

No circumstances weighed strongly in favor of imprisonment. That Mr. Gall had voluntarily withdrawn from the conspiracy, had terminated his own drug and alcohol abuse, and had become a productive member of society strongly suggested that he would "neither . . . return to criminal behavior nor [pose] a danger to society." *Id.* (J.A.

124-26). Indeed, the District Court found that a sentence of imprisonment would threaten Mr. Gall's progress and send a message that the law is "merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Id.* (J.A. 124-26). The sentence was therefore consonant with the "sufficient, but not greater than necessary" provision of § 3553(a), which strongly militates against incarceration without purpose or beneficial effect for the individual and society. See FAMM Brief at 5-12. Incarceration of individuals like Mr. Gall undoubtedly would discourage the very type of withdrawal and forthright admission that he evinced for the simple reason that such actions would only result in the same or similar punishment afforded to those who did not make such efforts. As the District Court recognized, this would promote "not respect, but derision, of the law." 374 F. Supp. 2d at 762-64 (J.A. 124-26).

A sentence of probation was wholly appropriate in this case. Probation has long been recognized as the best means by which society can impose punishment on an individual who poses little or no threat of recidivism and for whom imprisonment would be unjustified and counter-productive. *E.g.*, *United States* v. *Murray*, 275 U.S. 347, 357-58 (1928) ("Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence."). Mr. Gall fits this description. Entirely of his own volition, he has since shown himself to be willing and able to conform with governing law and reintegrate into the community. Imprisonment would be not only unduly punitive but would in fact harm society's interests by removing a productive, law-abiding member from its ranks.

The decision not to incarcerate Mr. Gall does not remove the taint of Mr. Gall's conviction or its collateral consequences for his future. These consequences will be long-lasting for Mr. Gall, who was only 26 years old at the

time of sentencing. Mr. Gall will, moreover, be subject to strict limitations on his freedom of movement and conduct for the next three years. And, as the District Court noted, he would "always face[] harsh consequences . . . if he violates the conditions of his probationary term." 374 F. Supp. 2d at 762-64 (J.A. 124-26) ("[P]robation is not an act of leniency."). The District Court plainly acted within its discretion in finding that a sentence of probation for three years, with special conditions, satisfied the purposes set forth in § 3553(a)(2). See *United States* v. *Likens*, 464 F.3d 823, 827 (8th Cir. 2006) (Bright, J., dissenting) ("[T]hree years' probation . . . serve[s] to significantly curtail [the defendant's] mobility, activities, drug-use, and personal freedom while sparing the citizens of this country the expense of incarcerating a person in poor health who is no danger to society. Incarceration is not the only, and indeed not even always the best, means of punishing or deterring crime.").

The sentence was reversed by the Eighth Circuit not because it represented an abuse of discretion, but because it was not the same sentence that the court of appeals would have imposed. The Eighth Circuit's opinion asserts that the District Court "did not properly weigh" the seriousness of the offense, "placed too much emphasis" on Mr. Gall's post-offense rehabilitation, and should have given "significant weight" to the possibility of unwarranted sentencing disparities. 446 F.3d at 889-90 (J.A.138-39). These statements reflect a decided lack of deference to the District Court's reasoned judgment.

Most telling is the Eighth Circuit's bald assertion that "the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities." *Id.* at 890 (J.A. 139). This is simply incorrect. The District Court identified this factor explicitly in its sentencing memorandum as bearing on the appropriate sentence. 374 F. Supp. 2d at 760 (J.A. 119). It noted that the Guidelines recommended a range of imprisonment for the

offense at issue, and recognized that a sentence of probation was facially disparate from those imposed in other cases involving similar conduct. *Id.* at 764 (J.A. 126). Yet, citing statutory policy that "imprisonment is not an appropriate means of promoting correction and rehabilitation," § 3582(a), it found that the disparity was fully warranted by the particular circumstances of the case, including Mr. Gall's exceptional rehabilitation. 374 F. Supp. 2d at 762-64 (J.A. 122-27). The District Court thus did fully consider, and give appropriate weight to, the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).[10] There was thus no abuse of discretion in the District Court's judgment, and the sentence should have been affirmed as reasonable.

B. The District Court's Choice Of A Below-Guidelines Sentence Was Supported By Extraordinary Circumstances.

Even under *de novo* review of the type contemplated by the extraordinary circumstances test and applied by the Eighth Circuit, the court of appeals erred. Contrary to its conclusion, the facts of this case – particularly Mr. Gall's post-offense rehabilitation – constitute "extraordinary circumstances" that justify the sentence imposed by the District Court.

Post-offense rehabilitation is extraordinary if it is genuine, enduring, and undertaken independent of any threat of criminal sanctions. *E.g.*, *United States* v. *Craven*, 239 F.3d 91, 100 (1st Cir. 2001). Mr. Gall's rehabilitation is all of

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[10] The court of appeals mischaracterized the sentence of probation imposed on Mr. Gall as a "100% downward variance." 446 F.3d at 889 (J.A. 137). This is correct only when viewed from the inflexible standpoint that incarceration was compulsory here. It also presumes that the range recommended by the Guidelines is the benchmark by which the final sentence is to be determined, thereby improperly elevating the Guidelines over the other factors of § 3553(a).

these. His withdrawal from the conspiracy was voluntary and self-motivated (and occurred long before its discovery by authorities). Cf. *United States* v. *Pyles*, 482 F.3d 282, 285, 292 (4th Cir. 2007) (reversing non-Guidelines sentence when the defendant did not commence rehabilitation until after arrest); *United States* v. *Givens*, 443 F.3d 642, 645 (8th Cir. 2006) (same); *United States* v. *Medearis*, 451 F.3d 918, 921 (8th Cir. 2006) (same). He has since completed his university education, earned a reputation as a reliable and honest employee, remained sober, and led a law-abiding life. Cf. *Moreland*, 437 F.3d at 437 (reversing variance because of the defendant's "desultory pursuit of his education and his spotty employment history"); *United States* v. *Rogers*, 400 F.3d 640, 642 (8th Cir. 2005) (reversing variance when the defendant committed two parole violations), *cert. denied*, 126 S. Ct. 1020 (2006). These circumstances are demonstrably "extraordinary," and justify the non-Guidelines sentence in this case pursuant to these precedents. See *United States* v. *Clay*, 483 F.3d 739, 742 (11th Cir. 2007) (upholding variance when defendant commenced rehabilitation prior to arrest); *United States* v. *Newlon*, 212 F.3d 423, 424-25 (8th Cir. 2000) (upholding departure); *United States* v. *DeShon*, 183 F.3d 888, 889, 891 (8th Cir. 1999) (same); *United States* v. *Workman*, 80 F.3d 688, 701-02 (2d Cir. 1996) (same).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Eighth Circuit and remand with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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ADDENDUM

STATUTORY ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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[1] So in original. The period probably should be a semicolon.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * *

[3] So in original. The second comma probably should not appear.

18 U.S.C. § 3742. Review of a sentence

* * * *

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give

due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

* * * *

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

* * * *